

<b>Bank of Am. N.A. v Lam</b>
2013 NY Slip Op 33406(U)
December 6, 2013
Supreme Court, New York County
Docket Number: 0115035/2009
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART IA PART 16

*Justice*

Index Number : 115035/2009  
BANK OF AMERICA  
vs  
LAM, CHAU T.  
Sequence Number : 007  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are determined in accordance with the accompanying memorandum decision.

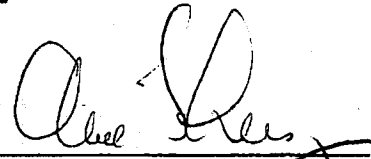
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

DEC - 9 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: DEC 06 2013

  
\_\_\_\_\_  
ALICE SCHLESINGER J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 16

-----X  
BANK OF AMERICA NATIONAL ASSOCIATION AS  
SUCCESSOR BY MERGER TO LASALLE BANK  
NATIONAL ASSOCIATION, AS TRUSTEE FOR  
MORGAN STANLEY LOAN TRUST 2006-2  
3476 Stateview Boulevard  
Ft. Mill, SC 29715,

Plaintiff,

- against -

Index No. 115035/09  
Motion Seq. No. 007

CHAU T. LAM, YAH RONG TING, ALAN CHI-  
LUNG WONG A/K/A ALAN CHI LUNG WONG,  
ADAMAR OF NEW JERSEY INC., BOARD OF  
MANAGERS OF EIGHT EAST TWELFTH  
CONDOMINIUM, HSBC BANK USA, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD,  
NEW YORK CITY PARKING VIOLATIONS BUREAU,  
NEW YORK CITY TRANSIT ADJUDICATION  
BUREAU, JOHN DOE (said name being fictitious, it  
being the intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein, and any  
parties, corporations or entities, if any, having or claiming  
an interest or lien upon the mortgaged premises,

Defendants.

-----X  
**SCHLESINGER, J.:**

This is an action to foreclose a mortgage on a condominium apartment located at 8 East 12th Street, Unit # 2, New York, New York 10003. Plaintiff Bank of America National Association, as successor by merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Loan Trust 2006-2 moves, pursuant to CPLR 3212, for summary judgment of foreclosure and sale, and for dismissal of the defenses asserted in the answers of defendants Chau T. Lam ("Lam"), Yah Rong Ting ("Ting") and the Board of Managers of Eight East Twelfth Condominium ("Board of Managers"), pursuant to CPLR 3211(b). Plaintiff also requests the following additional relief: (l) that

all answering defendants' cross claims be severed or that the cross claims be ordered separately tried pursuant to CPLR 603; (ii) that "John Doe" be dropped as a party defendant in this action; (iii) that plaintiff's name be amended to reflect the succession of Bank America National Association ("Bank of America") by U.S. Bank National Association ("U.S. Bank") as trustee, and that the caption be amended accordingly; (iv) that the address of the plaintiff be deleted from the caption, and the caption be amended accordingly; (v) that all non-appearing defendants "be deemed in default, and the defaults fixed and determined; and (vi) "for such other and further relief as to the Court may deem just and proper." Notice of Motion, at 2.

Defendants Lam and Alan Chi-Lung Wong a/k/a Alan Chi Lung Wong ("Wong") cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint with prejudice on the ground that plaintiff lacks standing. Defendant Ting, by way of her attorney's affirmation, supports the plaintiff's motion and the Board of Managers, too, offers no opposition to the motion.

#### FACTUAL ALLEGATIONS

On September 1, 2005, defendant Lam borrowed \$900,000 from nonparty Lynx Mortgage Bank LLC ("Lynx"). The loan was evidenced by a promissory note (the "Note") signed by Lam, and secured by a mortgage on the condominium, also dated September 1, 2005 (the "Mortgage"). The Mortgage was executed by Lam, and her husband, defendant Wong. Defendant Ting, who is alleged to be a 50% owner of the condominium apartment,<sup>1</sup> is also a signatory.

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<sup>1</sup> According to the Board of Manager's answer, defendants Lam and Wong acquired title to the condominium by deed dated September 1, 2005 and recorded on September 23, 2005. Amended Answer and Cross-Claims of Defendant Board of Managers of Eight East Twelfth Condominium, dated March 23, 2010, ¶ 25.

In support of plaintiff's motion, plaintiff submits an Assignment of Mortgage that is dated October 6, 2009 (the "Assignment"). This document purports to assign the Mortgage to plaintiff. Weinert Affirm., Ex. E. The Assignment identifies the assignor as the Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Lynx. In this regard, the Mortgage provides in a section entitled "Borrower's Transfer to Lender of Rights in the Property":

"I mortgage, grant and convey the Property to MERS (solely as nominee for Lender and Lender's successors in interest) and its successors in interest subject to the terms of this Security Instrument. This means that, by signing this Security Instrument, I am giving Lender those rights that are stated in this Security Instrument and also those rights that Applicable Law gives to lenders who hold mortgage on real property. I am giving Lender these rights to protect Lender from possible losses that might result if I fail to [comply with certain obligations under the Security Instrument and accompanying Note.]

I understand and agree that MERS holds only legal title to the rights granted by me in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right:

- (A) To exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property; and
- (B) To take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Weinert Affirm., Ex. D: Mortgage, at 3. The Assignment is executed by Elpiniki M. Bechaka, identified as an assistant secretary and vice president of MERS.

Plaintiff also submits an affidavit of merit from Laresea T. Jett sworn to on May 24, 2013. Ms. Jett avers that she is:

"Vice President Loan Documentation of Wells Fargo Bank, N.A. DBA America's Servicing Company, (hereinafter "Wells Fargo") the servicer for U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-2, Mortgage Pass-Through Certificates, Series 2006."

Jett Aff., ¶ 1. Ms. Jett avers that "Plaintiff is the mortgagee of record and was in possession of the note prior to the commencement of this action." *Id.*, ¶ 3. She then contends that

"U.S. Bank National Association, As Trustee, successor in interest to Bank of America, National Association, as Trustee successor by merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-2, Mortgage Pass-Through Certificates, Series 2006-2 is in possession of the Promissory Note. The Promissory Note was executed in blank."

*Id.*, ¶ 3. Thus, according to Ms. Jett, the trustee of the entity that owns the Mortgage and Note changed from LaSalle Bank National Association, to Bank of America as a result of a merger, and then to U.S. Bank at some time after this action was commenced. Plaintiff's counsel submits a copy of an affidavit sworn to in April 2012, both by a vice-president of Bank of America and a vice-president of U.S. Bank, who aver that substantially all of Bank of America's corporate trust business was sold to US Bank pursuant to a purchase agreement dated November 11, 2010. See Weinert Affirm., Ex. R. According to the Schedule A attached thereto, one of the assets sold to U.S. Bank was the "Morgan Stanley Mtg Loan Trust 2006-2," with a succession date of June 10, 2011. *Id.* Plaintiff requests that the caption be amended to reflect that U.S. Bank is now the trustee of this mortgage-backed security.

Ms. Jett avers that, from her review of the records kept by Wells Fargo, defendants defaulted on the loan by failing to make the payment due on June 1, 2009. As of the date of the complaint, there was due and owing an unpaid principal balance of \$856,079.00, plus interest at the rate of 5.75% from May 1, 2009. As of May 23, 2013, Ms. Jett avers that the loan remains in default and that the total amount due plaintiff on the Note is \$1,107,596.48. Jett Aff., ¶¶ 8-9.

This action was commenced by plaintiff on October 26, 2009. The unverified complaint alleges that "Plaintiff is . . . the owner and holder of a note and mortgage being foreclosed." Complaint, ¶ First. Defendant Lam, appearing pro se, answered the complaint on or about November 27, 2009, contending, inter alia, that plaintiff lacked standing to bring the action. Defendant Wong, also appearing pro se, served an answer to the complaint on November 16, 2009 and filed his answer with the County Clerk on December 7, 2009. Wong's answer is identical to the answer filed by Lam, and thus he, too, has raised plaintiff's lack of standing as an affirmative defense. The settlement conference required by CPLR 3408 was held by the court on May 5, 2010. On or about December 15, 2011, a new law firm was substituted as counsel for plaintiff in place and stead of Stephen J. Baum, P.C. (the Baum firm), the law firm that commenced the action.

### DISCUSSION

#### Wong's Alleged Default

As an initial matter, I deny plaintiff's motion to the extent that it seeks a default judgment against defendant Wong. This defendant served and filed his answer to the complaint back in 2009, and a copy of that pleading is easily found on SCROLL ("The Supreme Court Records On-Line Library"). On reply, plaintiff's counsel explains that Wong's answer was not in the file transmitted from prior counsel, the Baum firm, but argues that since his answer is identical to the answer filed by defendant Lam and he is now represented by an attorney who has briefed the merits of plaintiff's summary judgment motion, plaintiff's motion should be treated as one for summary judgment against both Lam and Wong.

It is well settled that a movant cannot introduce new arguments in support of, or new grounds for relief, in reply papers (*Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21-22 [1<sup>st</sup> Dep't 2002]), and it is equally well settled that a notice of motion must specify the relief demanded (CPLR 2214[a]). However, where a notice of motion contains a general relief clause, i.e., "for such other and further relief as the Court may deem just and proper," as is the case herein, the court has discretion "to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced." *Tirado v Miller*, 75 AD3d 153, 158 (2<sup>nd</sup> Dep't 2010).

The relief sought herein is foreclosure, and I find that there is no prejudice to Wong if I treat the plaintiff's motion as seeking summary judgment pursuant to CPLR 3212. Wong and Lam are now both represented by legal counsel who has thoroughly briefed their defenses and defense counsel has cross-moved, on behalf of both defendants, for dismissal of the complaint for lack of standing.

#### Plaintiff's Standing

In opposition to this motion, defendant Lam submits an affidavit in which she contends that plaintiff has not submitted any evidence demonstrating that it held the Note and Mortgage at the time this action was commenced on October 26, 2009. Defendant Lam further contends that Elpiniki M. Bechaka, the person who executed the Assignment from Lynx to plaintiff on October 6, 2009, is or was an attorney with the Baum firm and is a "robosigner,"<sup>2</sup> and that less than one month after the Mortgage was

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<sup>2</sup> "Robosigning" refers to the fraudulent practice wherein an affiant signs, in a short time frame, numerous affidavits and legal documents asserting the lender's right to foreclose, despite having no personal knowledge of the facts contained in them. See *generally Ohio v GMAC Mtge., LLC*, 760 F Supp 2d 741, 743 (ND Ohio 2011).



assigned, her law firm commenced this foreclosure action. Wong, too, asserts plaintiff's lack of standing as a defense to this action. Counsel for defendants Lam and Wong argue that, although the Assignment purports to assign the Mortgage, it does not assign the Note. He further points out that: (1) no copy of the Note was attached to the complaint at the time the action was commenced; (2) the signature of the Lynx representative who endorsed the Note in blank is illegible and undated; (3) the Jett affidavit claims that plaintiff was in possession of the Note prior to the commencement of this action, but Ms. Jett does not explain when or how Bank of America came into possession of the Note; (4) Ms. Jett is an employee of Wells Fargo, and plaintiff has not established that Wells Fargo has authority to act on behalf of the plaintiff in this case; and (5) none of the documents allegedly relied upon by Ms. Jett are attached as exhibits to plaintiff's motion.

Where standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief. See *US Bank N.A. v Madero*, 80 AD3d 751, 752 (2<sup>nd</sup> Dep't 2011); *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 (2<sup>nd</sup> Dep't 2009); *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 (2<sup>nd</sup> Dep't 2007). "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced." *Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 507-508 (2<sup>nd</sup> Dep't 2013), quoting *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 (2<sup>nd</sup> Dep't 2011); see also *Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 695 (1<sup>st</sup> Dep't 2012). "Either a written assignment of the underlying note or the physical

delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation.” *HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 (2<sup>nd</sup> Dep’t 2012), quoting *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754.<sup>3</sup>

### Assignment of the Mortgage

Defendants Lam and Wong attack the validity of the Assignment of the Mortgage on two grounds. First, defendants argue that where the plaintiff in a foreclosure action receives its interest in the mortgage from MERS acting as the “nominee” of the original lender, plaintiff must submit documents showing that the original lender consented to the assignment of the mortgage. Defendants rely on *Bank of N.Y. v Cepeda*, 39 Misc 3d 1221(A), 2013 NY Slip Op 50686(U) (Sup Ct, Kings County 2013) (Schack, J.); *Bank of N.Y. v Mulligan*, 28 Misc 3d 1226(A), 2010 NY Slip Op 51509(U) (Sup Ct, Kings County 2010) (Schack, J.); *Bank of N.Y. v Alderazi*, 28 Misc 3d 376 (Sup Ct, Kings County 2010) (Saitta, J.); *HSBC Bank USA, N.A. v Yeasmin*, 27 Misc 3d 1227(A), 2010 NY Slip Op 50927(U) (Sup Ct, Kings County 2010) (Schack, J.). The gist of these decisions is that, as a mere nominee, MERS possesses few or no legally enforceable rights beyond what its principal, the lender, gives it and that the language of the mortgages at issue therein were not sufficient to bestow any authority on MERS to assign the mortgage.

Notably, defense counsel does not cite to *US Bank N.A. v Flynn*, 27 Misc 3d 802 (Sup Ct, Suffolk County 2010) (Whelan, J.), which reached a contrary result. In the

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<sup>3</sup> Delivery of the note during the pendency of the action is insufficient. *Homecomings Fin., LLC v Guldi*, 108 AD3d at 508-509; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 210 (2<sup>nd</sup> Dep’t 2009).

*Flynn* case, the bank had successfully argued that the language of the mortgage indenture itself, which names MERS as mortgagee of record and nominee of the lender, its successors and assigns, and confers upon it broad authority to act with respect to the mortgage in all ways that the original lender, its successors and assigns could act, including the right to foreclose, and to take any action required of the lender, including, but not limited, to releasing or discharging the mortgage, was sufficient to confer authority upon MERS to effect a valid assignment of the mortgage. Both the First and Second Departments have adopted this reasoning, and rejected the argument that MERS lacks authority to assign a mortgage.

In *Bank of New York v Silverberg*, 86 AD3d 274, the Second Department specifically recognized that a mortgage consolidation agreement, identical in all respects to the Mortgage at issue herein, “gave MERS the right to assign the mortgages themselves.” *Id.* at 281. The borrowers had argued in that case that MERS could not assign the consolidated mortgage, because the clauses in the mortgages delegating to MERS the powers to act as the original lender’s nominee had no force and effect without a power of attorney from the original lender to MERS. Brief for Plaintiff-Respondent in *Bank of N. Y. v Silverberg*, available at 2010 WL 9583720, at \*12. The bank, however, argued that the underlying mortgages specifically provided in the section titled “Borrower’s Transfer To Lender Of Rights in The Property” that MERS, as the original lender’s nominee, had the right “to exercise any and all of those rights, including, but not limited to, the right to foreclose and sell the Property.” The bank further argued that the borrowers had granted the lender “those rights that are stated in

this Security Instrument,” and that one of these rights, set forth in paragraph 20 of the mortgage, was that the “Note, or an Interest in the Note, together with this Security Instrument, may be sold one or more times.” Thus, the bank argued that MERS was expressly authorized to sell or transfer the mortgages, as it did pursuant to the written assignment it executed. *Id.*, at \*12-13. The First Department has also ruled that where the mortgage contract confers broad powers upon MERS as nominee to act on the original lender's behalf, MERS has the authority to assign the mortgage. See *Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d at 696.

The Mortgage at issue herein is the same “Fannie Mae/Freddie Mac Uniform Security Instrument” at issue in the *Silverberg* and *Sachar* cases and contains the same paragraph 20, which provides that the “Note, or an Interest in the Note, together with this Security Instrument, may be sold one or more times.” See *Weinert Affirm.*, Ex. D: Mortgage, ¶ 20, at 12. Accordingly, I reject the argument that plaintiff must submit documents showing that Lynx specifically consented to the Assignment.

Defendants Lam and Wong also argue that plaintiff should be barred from relying on the Assignment, because the Baum firm, through its employee Ms. Bechakas, served as both assignor of the Mortgage and plaintiff's counsel at the commencement of this action, and that this presents an impermissible conflict of interest. Defendants rely on *U.S. Bank, N.A. v Guichardo*, 22 Misc 3d 1116(A), 2009 NY Slip Op 50151(U) (Sup Ct, Kings County 2009) (Schack, J.) and *Bank of N.Y. Mellon v Martinez*, 33 Misc 3d 1215 (A), 2011 NY Slip Op 51937(U) (Sup Ct, Queens County 2011) (Flug, J.).

In the *Guichardo* case, Justice Schack merely required the Baum firm to submit proof that the bank and MERS consented to the simultaneous representation, and his later sua sponte dismissal of the foreclosure action was reversed by the Appellate Division. See *U.S. Bank, N.A. v Guichardo*, 90 AD3d 1032 (2<sup>nd</sup> Dep't 2001). In the *Martinez* case, Justice Flug held only that:

"These actions undoubtedly raise the appearance of impropriety. Indeed, these practices were the subject of the October 6, 2011 settlement agreement between Steven J. Baum and the United States Attorney's Office for the Southern District of New York. Nevertheless, defendant has failed to establish that these actions breached a specific duty to plaintiff and require a dismissal of the action as a matter of law."

33 Misc 3d 1215(a) at 2. In response to this challenge to the Assignment, plaintiff submits a copy of Opinion 847, dated December 21, 2010, issued by the New York State Bar Association's Committee on Professional Ethics, which reached the conclusion that a lawyer may concurrently serve as an officer of MERS, for the purpose of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name. See *Bundt Affirm.*, Ex. J. Plaintiff has presented documentary proof that Ms. Bechakas held the position of assistant secretary and vice president of MERS as of July 19, 2007, and was authorized to execute mortgage assignments on behalf of MERS. *Bundt Affirm.*, Ex. I. In any event, since the Baum firm no longer represents the plaintiff, any conflict of interest no longer exists, and I find that this is not an independent basis to hold the Assignment invalid.

#### Ownership of the Note

Although I am not persuaded by the defendants' challenges to the Assignment, plaintiff has not proved that it owned the Note at the time this action was commenced.

Although the Mortgage was properly assigned by MERS as the nominee of the original mortgagee, Lynx, to Bank of America, the transfer of a mortgage without a note is a nullity and insufficient to confer standing to foreclose. *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 (2<sup>nd</sup> Dep't 2012); *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 (2<sup>nd</sup> Dep't 2011); *Bank of N.Y. v Silverberg*, 86 AD3d at 280. Here, MERS purportedly assigned the Mortgage to Bank of America without the Note. See Weinert Affirm., Ex. E.

Plaintiff argues that it acquired standing based upon a physical transfer of the indorsed Note prior to the commencement of the action. This claim is based entirely on the Jett affidavit, which states that plaintiff "was in possession of the note prior to the commencement of this action." Jett Aff., ¶ 3. The Appellate Division has held that the affidavit of the plaintiff's servicing agent must give "factual details as to the physical delivery of the note." *Homecomings Fin., LLC v Guldi*, 108 AD3d at 509, citing *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682 (2<sup>nd</sup> Dep't 2012); *HSBC Bank USA v Hernandez*, 92 AD3d at 844; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 109 (2<sup>nd</sup> Dep't 2011) (conclusory statement by loan servicing officer that his company was the holder of the mortgage by delivery without a written assignment was insufficient to establish standing to commence action).

In addition to the lack of any detail, the affiant, Laresea Jett, does not purport to have any personal knowledge of the delivery of the Note to Bank of America. Nor does she attach or describe any of Wells Fargo's books and records upon which she relies. "Where an officer's knowledge has been obtained either from unnamed and unsworn employees or unidentified and unproduced work records, the affidavit lacks any probative value . . ." *Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477, 479 (1<sup>st</sup>

Dep't 1987). What makes matters worse is that Ms. Jett admits that her affidavit is based, in part, on the unverified complaint drafted by the Baum firm.

In addition, Ms. Jett is an employee of nonparty Wells Fargo, and no proof of its authority to act on behalf of the plaintiff was submitted with plaintiff's moving papers. Even plaintiff's counsel admits, on reply, that an affidavit of merit must be executed either by an officer of the plaintiff or a person with a valid power of attorney. Plaintiff attempts to rectify this omission by submitting a document entitled "Limited Power of Attorney," executed by Bank of America on August 27, 2009, and purporting to name Wells Fargo as its loan servicer. However, the power itself states that it is "given pursuant to a certain Servicing Agreement and solely with respect to the assets serviced pursuant to such an agreement . . . dated July 1, 2006 . . ." Bundt Affirm., Ex. L. Plaintiff has not submitted a copy of this Servicing Agreement nor established that the Note and Mortgage at issue in this lawsuit are serviced pursuant to this agreement.

Accordingly, I find that plaintiff failed to demonstrate its prima facie entitlement to judgment as a matter of law, because it did not establish that the Note was physically delivered to Bank of America prior to the commencement of the action. An issue of fact exists as to who was in possession of the Note on October 26, 2009, which cannot be resolved on these papers. Accordingly, plaintiff's motion for summary judgment must be denied, and the cross motion of defendants Lam and Wong also denied since the latter have not proven, as a matter of law, that plaintiff lacks standing. *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 912 (2<sup>nd</sup> Dep't 2013); *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d at 683-684; *HSBC Bank USA v Hernandez*, 92 AD3d at 844; *US Bank N.A. v Madero*, 80 AD3d at 753; *but see Homecomings Fin., LLC v Guldi*,

108 AD3d at 509.

**CONCLUSION and ORDER**

For the foregoing reasons, plaintiff's motion for summary judgment of foreclosure and sale against defendants Lam, Wong and Ting is denied, as is the plaintiff's initial request for a declaration that defendant Wong is in default. That portion of plaintiff's motion requesting that "John Doe" be dropped as a party defendant in this action, that plaintiff's name be amended to reflect the succession of U.S. Bank, as trustee, for Bank of America, that the address of the plaintiff be deleted from the caption, and the caption be amended accordingly, is granted without opposition. The remaining portion of the plaintiff's motion seeking to declare all non-appearing defendants in default is also granted, without opposition. The cross motion of defendants Lam and Wong for dismissal of the complaint based on plaintiff's lack of standing is denied. Thus, it is hereby

**ORDERED** that plaintiff's motion for summary judgment of foreclosure and sale is denied; and it is further

**ORDERED** that plaintiff's motion to amend the caption is granted, and that the caption shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE, SUCCESSOR IN INTEREST TO  
BANK OF AMERICA, NATIONAL ASSOCIATION,  
AS TRUSTEE, SUCCESSOR BY MERGER TO  
LASALLE BANK NATIONAL ASSOCIATION,  
AS TRUSTEE FOR MORGAN STANLEY  
LOAN TRUST 2006-2,

Plaintiff,



- against -

Index No. 115035/09

CHAU T. LAM, YAH RONG TING, ALAN CHI-LUNG WONG A/K/A ALAN CHI LUNG WONG, ADAMAR OF NEW JERSEY INC., BOARD OF MANAGERS OF EIGHT EAST TWELFTH CONDOMINIUM, HSBC BANK USA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, and NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendants.

-----X

; and it is further

**ORDERED** that plaintiff's counsel shall serve a copy of this order with notice of entry on the Trial Support Office and the County Clerk, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

**ORDERED** that plaintiff's motion to declare all non-appearing defendants in default is granted, and that defendants New York City Transit Adjudication Bureau, New York City Parking Violations Bureau, New York City Environmental Control Board, Adamar of New Jersey Inc., and HSBC Bank USA have not appeared or answered the complaint and are deemed in default; and it is further

**ORDERED** that the cross motion by defendants Chau T. Lam and Alan Chi-Lung Wong a/k/a Alan Chi Lung Wong for summary judgment dismissing plaintiff's complaint is denied.

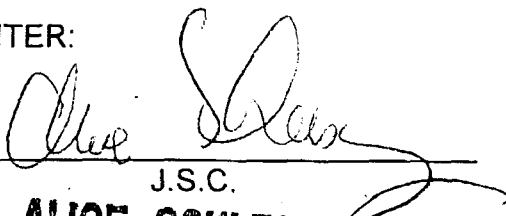
Dated: December 6, 2013

DEC 06 2013  
**FILED**

DEC - 9 2013

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
J.S.C.  
**ALICE SCHLESINGER**